charter in the same way that the stockholder's liability for assessments,[11] or to have liens declared on his stock [12] is determined by valid regulations of the incorporating sovereign. Entirely apart from this, however, the assessment may be considered as equivalent to a partial discharge of the policy. The situation is then exactly covered by the authorities. For anything done at the legal home of the corporation under the authority of its constitutionally enacted laws "which discharges it from liability there, discharges it from liability everywhere." [13] Even if resort to a new corporate power to insert this added condition precedent to liability be thought necessary, the situation is controlled by the broad language of the Gebhard case, although that decision on its facts may be limited to the discharge of obligations.

The only avenue of escape from this conclusion is the one taken by the New York case. It is, of course, well settled that local policy may lead a state to refuse to recognize a corporate power granted by a foreign sovereign.[14] By the same token, in view of the rigorously asserted policy of our law which finds expression in the Contract Clause, it is said that foreign corporations should be given no greater opportunity to avoid their obligations by the aid of a friendly legislature than is accorded to corporations created within the state.[15] But on the whole, it seems unwise to give effect to such an uncertain principle for the sake of protecting those who know that they are dealing with corporations created by sovereigns outside of the United States, and should realize that they are at the mercy of the sovereigns with whose creatures they deal.

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THE FOURTEENTH AMENDMENT AND THROUGH CONNECTING CARRIAGE. — At common law through connecting carriage of carload shipments was beyond the scope of a rail carrier's public duty, and so was entirely dependent on unregulated private arrangement between connecting carriers.[1] Perhaps a single exception existed in a duty to accept and forward carload shipments, without reloading, when tendered at a point of

[11] See *supra*, n. 5. No case has been found in which subsequent statutory liability was sought to be imposed on shareholders by a sovereign other than one of the United States, but it seems that in the absence of any constitutional prohibition at the domicile against impairing the obligation of contracts, such a statute would be effective.

[12] See Hudson River Pulp & Paper Co. *v.* Warner & Co., 99 Fed. 187. See also Warner *v.* Delbridge & C. Co., 110 Mich. 590, 594, 68 N. W. 283, 285.

[13] See Canada Southern Ry. *v.* Gebhard, *supra*, p. 538.

[14] Briscoe *v.* Southern Kansas Ry. Co., 40 Fed. 273.

[15] See dissenting opinion by Harlan, J., in Canada Southern Ry. Co. *v.* Gebhard, *supra*, p. 540.

[1] A carrier was bound to accept goods tendered by another carrier in the same manner as goods tendered by a private person. See 22 HARV. L. REV. 566–570. But it was under no obligation to make any different arrangements for the reception of connecting traffic. Thus it need not establish through routes or rates. Atchison, T. & S. F. R. Co. *v.* Denver & N. O. R. Co., 110 U. S. 667. *A fortiori*, it would seem, it was not bound to permit or establish physical connections. Kentucky & Indiana Bridge Co. *v.* Louisville & Nashville R. Co., 37 Fed. 567, 621. So it could establish through routing with one carrier and refuse another under similar circumstances, without unlawful discrimination. Atchison, T. & S. F. R. Co. *v.* Denver & N. O. R. Co., *supra*. See also Little Rock & M. R. Co. *v.* St. Louis, I. M. & S. Ry. Co., 59 Fed. 400; Oregon Short Line & U. N. Ry. Co. *v.* Northern Pacific R. Co., 61 Fed. 158.

physical connection.[2] Even this convenience was dependent on the caprice of the initial carrier, which owed no duty to allow its cars to move off its own lines.[3] The amelioration of this intolerable situation was one of the chief purposes of the large body of state and national legislation for the regulation of carriers, either directly or through administrative boards.[4] These regulations, aside from practical difficulties of formulation and enforcement, bid fair to be successful, but they have had, from time to time, as their chief obstacle the asserting of the due process clause of the Constitution.

But in spite of this it is well settled that valid regulation may be made, when warranted by the demands of commerce, to compel the construction of physical connections,[5] the reception of exchange traffic cars for main line transportation,[6] and reasonable alteration of running schedules in the interest of convenient connecting service.[7] However, a decidedly conservative view was taken in the case of *Louisville & Nashville R. Co.* v. *Central Stock Yards Co.*[8] It was there held that to compel one rail carrier to surrender loaded cars to another to facilitate the delivery of shipments consigned to points on the line of the latter, without making express provision for compensating the owner for the use of the cars and for safeguarding him against their loss or delayed return was obnoxious to the due process clause. Although the decision, when so limited, placed merely a formal obstacle in the way of such regulation, the attitude taken in the case resulted in at least one questionable state decision.[9] It is therefore pleasing to note a recent decision of the Supreme Court reaching an opposite result on very similar facts. *Michigan Central Ry. Co.* v. *Michigan Railroad Commission*, 236 U. S. 615.[10]

A more serious stumbling-block was thrown in the way of efficient regulation of through connecting service by this same *Central Stock Yards* case in another opinion, perhaps unnecessary to the decision. It was intimated that a terminal operated as an adjunct to main line transportation was in some way constitutionally immune from any regulation requiring through connecting service in the nature of terminal switching;[11] or as elsewhere expressed, that a terminal is a part of the quasi-private

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[2] See Michigan Central R. Co. *v.* Smithson, 45 Mich. 212, 221; Chicago, B. & Q. R. Co. *v.* Curtis, 51 Neb. 442, 453, 71 N. W. 42, 47. But see Oregon, etc. Ry. Co. *v.* Northern Pacific R. Co., 51 Fed. 465, 472.

[3] Pittsburg, C. C. & St. L. Ry. Co. *v.* Morton, 61 Ind. 539.

[4] See the remarks with reference to the Interstate Commerce Commission in Missouri & Illinois Coal Co. *v.* Illinois Central R. Co., 22 I. C. C. 39, 46.

[5] Wisconsin, M. & P. R. Co. *v.* Jacobson, 179 U. S. 287.

[6] Chicago, M. & St. P. Ry. Co. *v.* Iowa, 233 U. S. 334.

[7] Atlantic Coast Line R. Co. *v.* North Carolina Corporation Commission, 206 U. S. 1.

[8] 212 U. S. 132. See 22 HARV. L. REV. 449.

[9] Gulf, C. & S. F. Ry. Co. *v.* State, 56 Tex. Civ. App. 353, 120 S. W. 1028.

[10] For a statement of the case, see this issue of the REVIEW, p. 810. The case was distinguished on the ground that the Michigan court had held that the statute, under which the order was made, impliedly provided for compensation. Michigan Central R. Co. *v.* Michigan Railroad Commission, 168 Mich. 230, 132 N. W. 1068. But the same circumstance existed in the former case. See dissenting opinion of Mr. Justice McKenna, 212 U. S. 132, 148; and Louisville & Nashville Ry. Co. *v.* Central Stock Yards Co., 30 Ky. L. Rep. 18, 35, 97 S. W. 778, 790.

[11] 212 U. S. 132, 145.

property of a carrier, which other roads are bound to respect.[12] This rule in its extreme form was in substance repudiated in a case in which, owing to the large area of the terminal system, the court chose to regard switching as undistinguishable from main line transportation.[13] In a very recent decision the case was again distinguished. *Pennsylvania Co.* v. *United States*, 236 U. S. 351. On the ground that the terminal switching required had to do only with non-competitive traffic, and that like service was being rendered for other roads similarly situated, the order compelling it was upheld.[14] The latter feature seems unimportant, since it is very doubtful whether there is any duty of equal treatment as to those whom a carrier is not bound to serve,[15] unless it is a basis for finding a public profession of terminal carriage for others.[16] Moreover, public profession by a carrier of a related service is not essential to the validity of regulation requiring its performance. This is shown by the usual case of enforced through carriage, as to which there was no common-law duty.[17] Indeed, it seems that a private carrier may be compelled to undertake public carriage if public interest is sufficient.[18] It is submitted that the distinction taken as to absence of competition is likewise without basis. It seems plainly demonstrated that a carrier is bound in certain cases to perform connecting service over its terminal, and the fact that the required service assists a competitor as to the subject matter of competition should not conclusively determine the unreasonableness of the requirement.[19] A public carrier has no right to object to regulation on the ground that it diminishes profits unless it prevents realization of a reasonable income.[20] It appears that the objection to switching competitive traffic amounts to no more than that it causes financial loss, and should be tested by the same standard. Consequently the fact might be taken into consideration in determining the reasonableness of the service and the compensation necessary, but should not be of itself conclusive as to constitutional invalidity.

Although some shreds of the *Central Stock Yards* case may remain

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[12] See Pennsylvania Co. *v.* United States, 214 Fed. 445, 453 (dissenting opinion).

[13] Grand Trunk Ry. *v.* Michigan Railroad Commission, 231 U. S. 457.

[14] A statement of the case will be found in RECENT CASES, p. 809. The case is also important for its holding that such service does not amount to compelling one carrier to submit to the "use" of its terminals by another within the proviso of § 3 of the Commerce Act.

[15] See Little Rock & M. R. Co. *v.* St. Louis, I. M. & S. Ry. Co. and Oregon Short Line & U. N. Ry. Co. *v.* Northern Pacific R. Co., cited *supra*, n. 1.

[16] A carrier engaged exclusively in terminal carriage must serve all railroads on equal terms. St. Louis, S. & P. R. Co. *v.* Pekin U. R. Co., 26 I. C. C. 226.

[17] See n. 1, *supra*.

[18] It is submitted that this is the necessary result of the Pipe Line Cases, 234 U. S. 548. See 28 HARV. L. REV. 84.

[19] Compulsory terminal switching of competitive traffic was upheld in Chicago, I. & L. Ry. *v.* Railroad Commission of Indiana, 175 Ind. 630, 95 N. E. 364. See also Nashville *v.* Louisville & Nashville R. Co., I. C. C., No. 6484 (Feb. 27, 1915). *Contra*, Mississippi Railroad Commission *v.* Yazoo & M. V. R. Co., 100 Miss. 595, 56 So. 668. The opinion in the Jacobson case (*supra*, n. 5) indicated that the fact that the desired connection would open up competing markets and sources of supply which would deprive the railroad opposing the connection of a longer haul to less desirable markets and sources of supply would not make the requirement of connecting service unconstitutional.

[20] See 28 HARV. L. REV. 683.

even after the thrusts on each side by these two recent cases, the tendency of the court would appear to be to complete its destruction at the first opportunity.

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THE EFFECT OF A RELEASE BY THE DECEASED ON THE STATUTORY ACTION FOR DEATH BY WRONGFUL ACT. — It is a much mooted question whether the beneficiaries may recover, under statutes similar to Lord Campbell's Act,[1] if there is a defense which would have prevented the deceased from recovering had he lived. The primary inquiry in every such case is whether the statute gives the beneficiary a new and independent right of action, recognizing a property interest of the relatives in the life of the deceased, or merely abrogates the common-law rule that tort actions die with the injured party. At common law there were two severe rules calling for statutory relief, — personal actions died with the party injured, and the relatives of a deceased person had no action for his wrongful death. It would seem tolerably clear that the legislature was addressing itself to the second of these common-law defects when it provided an action for the benefit of the next of kin, whereby damages for their "pecuniary injury resulting from such death" might be recovered. Yet the courts have been considerably troubled by the nature of the right created. There are conflicting expressions in the English cases.[2] The American courts are divided; a few construe their statutes as merely preserving deceased's right of action.[3] By the weight of authority, however, a new cause of action accrues to the beneficiaries at the death of the deceased, in which they may recover the loss they have suffered from his death.[4]

Of course, under the minority view, any defenses good against the deceased would be good against those who succeed to his cause of action.[5] But even those courts which give the beneficiaries a new cause of action frequently reach the same result, basing their decisions on the common statutory provisions that "the wrongful act must have been such as

[1] 9 & 10 VICT., c. 93. For a comparative table of American statutes, see TIFFANY, DEATH BY WRONGFUL ACT, 2 ed., p. xix and Appendix.

[2] See Read *v.* Great Eastern Ry. Co., L. R. 3 Q. B. 555; Griffiths *v.* Dudley, L. R. 9 Q. B. 357. *Cf.* Blake *v.* Midland Ry. Co., 18 Q. B. 93; Seward *v.* The Vera Cruz, 10 A. C. 59.

[3] Mooney *v.* Chicago, 239 Ill. 414, 88 N. E. 194; Williams *v.* Alabama Great Southern R. R. Co., 158 Ala. 396, 48 So. 485; St. Louis, I. M. & S. R. R. R. Co. *v.* McNamare, 91 Ark. 515, 122 S. W. 102.

[4] Rowe *v.* Richards, 32 S. D. 66, 142 N. W. 664; Spradlin *v.* Georgia Ry. & Electric Co., 139 Ga. 575, 77 S. E. 799; Adams *v.* Northern Pac. Ry. Co., 95 Fed. 938; Mahoney Valley Ry. *v.* Van Alstine, 77 Oh. St. 395, 83 N. E. 667. See also cases cited in n. 13, *infra;* TIFFANY, DEATH BY WRONGFUL ACT, § 23. Most states now have survival statutes, providing that tort actions shall survive the death of the plaintiff and defendant or both, in addition to a statute like Lord Campbell's Act. See 15 HARV. L. REV. 854. The survival statute is usually held to give no right of action if the death was instantaneous. Moran *v.* Hollings, 125 Mass. 93. Maine and Michigan accordingly hold that the death statute applies only to cases of instantaneous death. Dolson *v.* Lake Shore & M. S. R. R. Co., 128 Mich. 444, 87 N. W. 629. See TIFFANY, DEATH BY WRONGFUL ACT, §§ 43, 44–1. The limitation is, however, not generally accepted. Commonwealth *v.* Metropolitan R. R. Co., 107 Mass. 236. See TIFFANY, DEATH BY WRONGFUL ACT, §§ 73, 74.

[5] Read *v.* Great Eastern Railway Co., L. R. 3 Q. B. 555; Mooney *v.* Chicago, 239 Ill. 414, 88 N. E. 194.